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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

(2)

No. 86-6923

JAMES WILLIE BROWN,

Petitioner,

v.

W. J. DODD, Sheriff,
Gwinnett County, Georgia,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

Joseph M. Nursey
Millard C. Farmer
P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

COUNSEL FOR PETITIONER

QUESTION PRESENTED

WHETHER PETITIONER, A PERSON WITH A LENGTHY AND SIGNIFICANT HISTORY OF SEVERE MENTAL ILLNESS, INCLUDING SEVERAL PREVIOUS COMMITMENTS TO INSTITUTIONS AS INCOMPETENT TO STAND TRIAL, WAS DENIED THE RIGHT TO A MEANINGFUL EVALUATION OF HIS COMPETENCY TO STAND TRIAL IN A CAPITAL CASE.

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IN THE

SUPREME COURT OF THE

UNITED STATES

JAMES WILLIE BROWN, Petitioner, v. W.J. DODD, Sheriff, Gwinnett County, Georgia, Respondent	*	No. _____

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner, James Willie Brown, requests that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia denying Petitioner an application for certificate of probable cause to appeal the denial of a state petition for writ of habeas corpus.

CITATION TO OPINION BELOW

The unpublished order of the Supreme Court of Georgia denying an application of certificate of probable cause to appeal was entered on February 17, 1987; a copy is attached as Appendix A. The unpublished order of the Superior Court of Gwinnett County denying Petitioner's state petition for writ of habeas corpus was entered on June 3, 1986 (Appendix B), rehearing denied on November 7, 1986 (Appendix C).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257. The order of the Supreme Court of Georgia was entered on February 17, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

HOW THE ISSUE WAS RAISED BELOW

The issue in the Question Presented was raised by petition for writ of habeas corpus in the Superior Court of Gwinnett County and raised in the application for certificate of probable cause to appeal in the Supreme Court of Georgia.

STATEMENT OF THE CASE

(i) Course of Prior Proceedings

James Willie Brown was convicted of murder and sentenced to death in the Superior Court of Gwinnett County, Georgia on July 2, 1981. On direct appeal to the Supreme Court of Georgia, the conviction and sentence were affirmed. Brown v. State, 250 Ga. 66; 295 S.E.2d 727 (1982). In December, 1982, Petitioner filed a petition for writ of habeas corpus in the Superior Court of Gwinnett County, Georgia. This petition was subsequently amended. The petition was denied by an order of the Superior Court of Gwinnett County on June 3, 1986, rehearing denied on November 7, 1986. An application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on February 17, 1987.

(ii) Statement of the Facts

Petitioner, James Willie Brown was arrested on May 15, 1975 for the May 13, 1975 death of Brenda Watson. Well prior to this offense, James Willie Brown had suffered from serious mental illness. He had been institutionalized at Central State Hospital in Georgia for mental illness in 1968, 1971 and 1972. While in

the Navy, he had been hospitalized for psychiatric care from April 1966 to February 1967.

Counsel was appointed for James Willie Brown on May 21, 1975.

On June 2, 1975, on the joint motion of the state and counsel for Petitioner, Petitioner was transferred to Central State Hospital for an evaluation of his competency to stand trial. On October 9, 1975, Central State Hospital reported that Petitioner was incompetent to stand trial. On a special plea of incompetence to stand trial, he was found incompetent to stand trial and recommitted to Central State Hospital on January 8, 1976.

On April 1, 1976, Central State Hospital reported that Petitioner remained incompetent to stand trial.

On January 7, 1977, Central State Hospital reported that James Willie Brown was competent to stand trial with the admonition of Dr. Miguel Bosch of Central State Hospital that "[w]e would also like to recommend that his trial be set and that you [the Superior Court] send for him a week to ten days before that day, as we feel that if he is kept in jail for a long period of time, it may be detrimental to his mental health."

On January 24, 1977, Petitioner was returned to the Gwinnett County Jail where he remained until April, 1977. In that period of time, his mental condition deteriorated and on April 19, 1977, his attorney filed another special plea of incompetence to stand trial. James Willie Brown was returned to Central State Hospital for evaluation and was again found to be incompetent to stand trial. On July 5, 1977, the state and counsel for Petitioner jointly moved the trial court to re-commit Petitioner to Central State Hospital as incompetent to stand trial. He remained institutionalized at Central State Hospital until September 24, 1980.

On January 30, 1980, Dr. Delatorre of Central State Hospital reported that James Willie Brown was competent to stand trial, but with the admonition "[b]ecause of his past history of decompensation of his mental illness during long periods of incarceration, we feel it would be in his best interest and in the best interest of the Court that he remain here [Central State] until a few days before his trial."

On May 22, 1980, at a hearing conducted at Central State Hospital, a hearing examiner ordered Petitioner held at Central State as an involuntary patient.

On September 22, 1980, Dr. Delatorre of Central State Hospital reported Applicant was competent to stand trial but noted "he has a past history of his illness during long periods of incarceration." Dr. Delatorre also stated, "we would respectfully submit to the court that his mental illness should be considered a mitigating factor in the deliberations and disposition of these charges." Petitioner was returned to the Gwinnett County Jail on September 24, 1980.

While institutionalized at Central State Hospital, Petitioner was consistently diagnosed as Schizophrenic, paranoid type, a functional psychotic disorder. Also, whenever he was returned to the Gwinnett County Jail, the doctors at Central State prescribed continued medication with antipsychotic drugs.

After James Willie Brown's return to the Gwinnett County Jail in September, 1980, his mental health rapidly deteriorated. On October 10, 1980, he was examined by Dr. Steven Marinkovic, a psychiatrist and Medical Director of the Gwinnett, Rockdale, Newton [Georgia] Mental Health Services. Dr. Marinkovic determined that Petitioner was again incompetent to stand trial. Petitioner's counsel was never informed of this evaluation.

From October, 1980 until the competency trial in April, 1981, there was no evaluation of Petitioner's mental health. The

trial to determine Petitioner's competency to stand trial was held before a jury [see, Official Code of Georgia Ann. §17-7-130] on April 8, 1981. On the morning of April 8, 1981, the trial court appointed Lewis Embry Collins, Jr. to evaluate Petitioner's competency to stand trial.

James Willie Brown's trial attorney, Mr. Frank Hester, thought that the court was appointing a psychiatrist competent to do a competency evaluation. (T Feb. 3, 1986 Hrg. at 42-43). Lewis Collins was introduced to Frank Hester as "Dr. Collins", from "Gwinnett Mental Health", and no further explanation was given of his qualifications at the time he "evaluated" James Willie Brown. (T Jan. 5, 1984 Hrg. at 57-58).

In fact, Lewis Collins had received his Ph.D from the College of Education at Georgia State University only ten days before he "evaluated" Petitioner. (T Jan. 5, 1984 Hrg. at 47-48). Collins was not a licensed psychologist in Georgia or any other state; in October, 1981, and again in April, 1982, he failed the state licensing examination. (Id. at 44, 47-48). Collins had received no formal training in conducting evaluations to determine competency to stand trial. (Id. at 150).

Collins' "evaluation" of James Willie Brown's competency to stand trial consisted solely of an interview of Petitioner lasting less than thirty (30) minutes to determine if James Willie Brown was oriented to date, time, place and situation. (Id. 56, 63). Collins interviewed no one else in making this "evaluation".

Collins did no psychological testing whatsoever of James Willie Brown. (Id. at 82). Collins did not talk with anyone at Central State Hospital concerning Petitioner's condition and did not look at any of Petitioner's records from Central State except for the two (2) page discharge summary. (Id. at 66-67). Collins had not seen Dr. Marinkovic's report of October 10, 1980 finding James Willie Brown incompetent to stand trial and did not discuss

James Willie Brown's condition with Dr. Marinkovic until August, 1981, some four (4) months after the competency trial and two (2) months after the guilt/innocence trial. (Id. at 38-43). This, despite the fact that Collins worked in the same office as Dr. Marinkovic.

It all boils down to this: James Willie Brown had at least a fifteen (15) year history of mental illness, he had been institutionalized for almost six (6) years as incompetent to stand trial, the last psychiatrist to evaluate him before Collins' "evaluation" had found him incompetent to stand trial, he was heavily medicated, he had been consistently diagnosed as suffering from a major thought disorder -- Schizophrenia, paranoid type, he had a history of deteriorating when returned to jail. Despite all of this, Collins "evaluated" James Willie Brown, without doing one minute of research into his past medical history and then the "evaluation" consisted solely and entirely of a twenty minute interview with Petitioner where Collins sought only to determine if Petitioner knew what day it was, what time it was, where he was, and what he was there for.

At Petitioner's competency trial, held the afternoon of Collins' twenty minute "evaluation", Collins -- referred to before the jury as "Dr. Collins" -- testified that Petitioner was competent to stand trial. Petitioner's counsel, Petitioner's mother and Petitioner's spouse testified that he was not competent to stand trial.[1]

After the jury found Petitioner competent to stand trial, he remained incarcerated in the Gwinnett County Jail for two (2) months before his trial. No further competency evaluation was

---

1. Of course, Collins never spoke with Petitioner's counsel, Petitioner's mother or Petitioner's spouse in making his competency "evaluation".

made prior to trial, despite his history of deteriorating while in jail.

During post trial proceedings, James Willie Brown was again found incompetent to proceed and was again committed to Central State Hospital.

Dr. Barbara Thomason, who supervised Lewis Embry Collins at the Gwinnett Mental Health Services, testified before the state habeas corpus court on January 5, 1984. Although Dr. Thomason was clearly biased against and hostile to James Willie Brown (see, e.g., T Jan. 5, 1984 Hrg. at 196-200), she conceded a few very important points. Dr. Thomason testified that an important step in making an informed evaluation of Petitioner's competency to stand trial would be to discuss his mental illness with Dr. Marinkovic and the doctors who treated Petitioner for six years at Central State Hospital (Id. at 157-158). She further testified that it would not be acceptable procedure to fail to read the file before making a competency evaluation. (Id. at 190-191). Of course, Collins had not read the file, talked with Dr. Marinkovic or talked with anyone at Central State Hospital before he "evaluated" James Willie Brown.

Dr. Wiley Bolden, the Chairman of the Board of Examiners of Psychology for the State of Georgia testified that the licensing examination "is a measure of . . . entry level ability and skills" (T. Jan. 5, 1984 Hrg. at 234) (emphasis added). Dr. Bolden testified that the examination is a minimal threshold of qualifications and that one who twice failed the examination may not be professionally qualified to act as a psychologist. (Id.)

Although Dr. Bolden had no specific experience in evaluating competency to stand trial, he testified that if faced with that task, he would want to interview the person to be evaluated more than one time, would seek a number of different sources of information and would also want to employ standardized

psychological tests such as the MMPI and the Rorschach. (Id. at 241-242).

Dr. Brad Fisher, a licensed psychologist and extremely qualified and experienced in conducting forensic psychological evaluations testified before the habeas corpus court on the minimum requirements for conducting a meaningful evaluation of competency to stand trial. Dr. Fisher testified that a person who is diagnosed as schizophrenic, paranoid type, presents a particularly difficult situation for a psychologist doing an evaluation of that person's competency to stand trial. A person suffering from this psychotic disorder may, on the surface, give the illusion of normalcy and be well oriented in the typical spheres of attention, such as time, place, date, etc. However, under the surface, the person suffering from this psychotic disorder may very well be acting under a delusional system which places him completely out of touch with reality. (T Feb. 3, 1986 Hrg. at 11-17).

In order to make a meaningful evaluation of Petitioner's competence to stand trial it would be necessary to review all available psychiatric records from his past commitments for psychiatric care, to consult with the mental health professionals who had previously evaluated and treated him, to speak with family and other persons close to him, to perform standardized personality inventory tests and projective tests such as the MMPI, the Rorschach test and the Thematic Apperception test. A meaningful evaluation would also involve in-depth clinical interviews of far more than 20 minutes. (T Feb. 3, 1986 Hrg. at 17-19, 24-26).

Dr. Fisher's testimony concerning the minimum necessary for a meaningful evaluation of competency to stand trial is consistent with Dr. Bolden's testimony on this point. Of course, Lewis Collins performed none of these minimal requirements. In

Dr. Fisher's highly qualified opinion, James Willie Brown did not receive a meaningful evaluation of his competency to stand trial. No competent psychologist would make an evaluation of competency to stand trial based solely on a less than thirty minute interview. (Id. at 19-20, 37).

REASONS FOR GRANTING THE WRIT

PETITIONER, A PERSON WITH A LENGTHY AND SIGNIFICANT HISTORY OF SEVERE MENTAL ILLNESS, INCLUDING SEVERAL PREVIOUS COMMITMENTS TO INSTITUTIONS AS INCOMPETENT TO STAND TRIAL WAS DENIED THE RIGHT TO A MEANINGFUL EVALUATION OF HIS COMPETENCY TO STAND TRIAL IN A CAPITAL CASE.

In Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087 (1985), this Court held that where an accused person raises a significant question as to his sanity at the time of the offense, "the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 105 S.Ct. at 1097 (emphasis added). This right should apply equally where counsel for an accused person raises a significant issue concerning the accused person's competency to stand trial.

The trial and conviction of a mentally incompetent defendant violates due process of law. Bishop v. United States, 350 U.S. 961 (1956); Drope v. Missouri, 420 U.S. 162 (1975). "The trial and conviction of a person mentally and physically incapable of making a defense violates certain immutable principles of justice which inhere in the very idea of a free government." Sanders v. Allen, 69 App.D.C. 307, 100 F.2d 717, 720 (1938). Cf., Pate v. Robinson, 383 U.S. 375 (1966).

James Willie Brown's counsel assumed that the trial court was appointing a psychiatrist competent to evaluate his client in light of Petitioner's documented fifteen (15) year history of

severe mental illness. Instead, James Willie Brown was "evaluated" by a person who had received his Ph.D. in Education only ten (10) days prior to the "evaluation" and who subsequently twice failed the state licensing examination -- the minimal threshold of qualification.

The evaluator, Lewis Collins, failed to conduct any psychological tests whatsoever, conducted only a 20 minute interview with Petitioner, blithely ignored six (6) years of psychiatric evaluations finding Petitioner incompetent to stand trial and failed to take the simple step of talking with Dr. Marinkovic, a psychiatrist working in the same office as Collins, who six months earlier had found Petitioner incompetent to stand trial.

A qualified psychiatrist is necessary to adequately identify the "elusive and often deceptive" symptoms of mental illness. Solesbee v. Balkcom, 339 U.S. 9, 12 (1950). James Willie Brown did not receive even the bare minimum competent evaluation.

CONCLUSION

Based on the foregoing, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Joseph M. Nursey
Millard C. Farmer

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by mail to Mr. Daniel Porter, Assistant District Attorney, P.O. Box 569, Lawrenceville, Georgia 30246.

This 14th day of May, 1987

Joseph M. Nursey
COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-

JAMES WILLIE BROWN,

Petitioner,

v.

W.J. DODD, Sheriff,

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF GEORGIA

Application No. 3849

SUPREME COURT OF GEORGIA

ATLANTA February 17, 1987

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JAMES WILLIE BROWN V. W. J. DODD, SHERIFF

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

APPENDIX A

FILED IN OFFICE
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA.
JUN 3 2 00 PM '82
GARY B. BATES, CLERK

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

JAMES WILLIE BROWN	*	CIVIL ACTION NO. 82-A-3344
Petitioner	*	
VS.	*	
W. J. DODD, SHERIFF GWINNETT COUNTY	*	PETITION FOR WRIT OF HABEAS CORPUS
Respondent	*	

ORDER

The above-styled Petition for Writ of Habeas Corpus having been duly filed and come before this Court for a hearing, and after hearing evidence and argument of counsel it is the finding of this Court that:

1.

The Petitioner was found competent to stand trial by a jury on April 8, 1981 after the presentation of evidence by Petitioner and by the State.

2.

The Petitioner was convicted of murder and sentenced to death by a jury on July 2, 1981.

3.

Petitioner was tried pursuant to a Demand for Speedy Trial filed, at Petitioner's insistence, by his retained attorney, Frank Hester.

4.

Prior to the competency hearing, the Petitioner was psychologically examined by Embry Collins, who held a Doctorate Degree from Georgia State University and who had conducted numerous court-order competency examinations as an employee of the Gwinnett-Newton-Rockdale Mental Health Department and found to be competent to stand trial.

5.

The Petitioner himself testified at the competency hearing that he understood the nature of the charges against him and the nature of the proceedings.

6.

The only evidence presented at the competency hearing in support of the Petitioner's insanity was the testimony of his retained attorney, Frank Hester.

7.

Frank Hester testified at the present hearing that the Petitioner was able to assist him in the investigation of this case and in his preparation for trial. In fact, Mr. Hester testified that most of what he knew about the case he learned from the Petitioner.

THEREFORE, it is the finding of this Court that:

1.

Embry Collins was qualified by his education and experience to give an opinion as to the sanity of the Petitioner.

2.

The jury properly found the Petitioner competent to stand trial based upon the evidence before it.

THEREFORE, IT IS HEREBY ORDERED that, as to this ground, the Petitioner's Petition for Writ of Habeas Corpus be DENIED.

FURTHER, the Petitioner having presented no evidence in regard to his other allegations and the Court having considered these allegations,

IT IS HEREBY ORDERED that, as to these grounds, the Petitioner's Petition for Writ of Habeas Corpus be DENIED.

IT IS SO ORDERED this 3rd day of June, 1986.

HONORABLE JAMES A. HENDERSON
JUDGE, GWINNETT JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

JAMES WILLIE BROWN
petitioner

VS.

W. J. DODD, SHERIFF
respondent

CIVIL ACTION NO: 82-A-3344

FILED IN OFFICE
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA.
Nov 7 1 30 PM '86
GARY H. HAYES, CLERK

ORDER

Counsel for the Petitioner having made an oral Motion for Reconsideration of the Court's denial of Petitioner's Petition for a Writ of Habeas Corpus and said motion having been considered by the Court,

IT IS HEREBY ORDERED that this Court adopts the findings made in its order of 3rd June, 1986 and that Petitioner's Motion for Reconsideration is DENIED.

IT IS SO ORDERED this 7th day of November, 1986.

James A. Henderson
JAMES A. HENDERSON
JUDGE, GWINNETT SUPERIOR COURT

APPENDIX C

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES WILLIE BROWN	*	CASE NO. 86-6923
PETITIONER	*	
VS.	*	
W. J. DODD, SHERIFF GWINNETT COUNTY	*	
RESPONDENT	*	

RESPONSE TO PETITIONER'S BRIEF

BY THE DISTRICT ATTORNEY, GWINNETT JUDICIAL CIRCUIT

STATE OF GEORGIA

DANIEL J. PORTER
ASSISTANT DISTRICT ATTORNEY

POST OFFICE BOX 569

LAWRENCEVILLE, GEORGIA 30246-0569

PHONE (404) 962-1435

IN THE SUPREME COURT OF THE UNITED STATES

JAMES WILLIE BROWN	*	CASE NO. 86-6923
PETITIONER	*	
VS.	*	
W. J. DODD, SHERIFF GWINNETT COUNTY,	*	
RESPONDENT	*	

RESPONSE TO PETITIONER'S BRIEF

FACTUAL BACKGROUND

The Respondent essentially agrees with the chronology set out by Petitioner except to note the following:

1.

The examination conducted on October 10, 1980 by Dr. Marinkovic was conducted at the request of jail authorities because Petitioner was passing threatening and suggestive notes to female inmates. This evaluation was for jail security purposes, not for competency evaluation.

2.

Petitioner's retained counsel, Frank Hester, filed a Demand for Speedy Trial at the specific request of the Petitioner.

3.

Dr. Lewis Embry Collins, Jr. was subjected to cross-examination by Mr. Hester both at the competency trial on April 8, 1981 and at the trial of the case in chief.

4.

Petitioner was found competent to stand trial by a jury after testimony by Dr. Collins, jail personnel, and the Petitioner himself regarding his competency. This testimony was only rebutted by the testimony of his retained attorney, Frank Hester.

5.

The Respondent denies and dies not agree with the characterization of the tesimony of Dr. Thomason and further notes that Dr. Thomason supported Dr. Collins' evaluation procedures and his competency.

6.

Petitioner's prior counsel, Mr. hester, "testified" on February 3, 1986 that his client was able to provide him with information to investigate the case and that in fact he (nester) did conduct an extensive investigation into the facts surrounding the charges against the Petitioner.

ARGUMENT OF RESPONDENT

In this case, the Petitioner was found competent to stand trial by a jury. At this jury trial, the only evidence of incompetence was the testimony of his retained attorney. The defendant himself testified before the jury that he was ready to stand trial and in fact wanted to stand trial. The decision of the jury was not based solely on the evidence provided by Dr. Collins but upon all evidence present. Further, it should be

noted that the chain of events was precipitated by the filing of a Demand for Speedy Trial by the Petitioner.

The cases cited by the Petitioner can be distinguished on several points.

First, in both Ake and Blake the defendants were indigent and represented by appointed counsel. Here, the Petitioner was represented by retained counsel who was well aware of the Petitioner's prior problems (probably more aware that the State). It was incumbent upon counsel to examine the competency of the evaluation of the defendant.

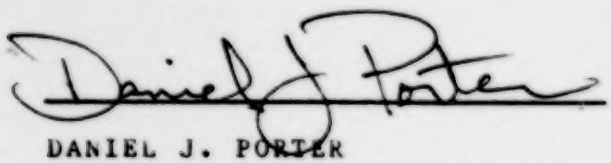
Second, both cases cited by the Petitioner go to the issue of determining sanity at the time of the offense. In both cases, the Court ruled that State action prevented the presentation of an adequate defense. The issue presented in the present case is competency to stand trial. No action by anyone prevented James Willie Brown from receiving an adequate evaluation of his competency to stand trial.

In conclusion, the thread that runs through all proceedings is that James Willie Brown demanded a speedy trial and got it. He was able, by the testimony of his attorney, to assist in the prepration and presentation of his defense which failed to convince a trial jury. He was so insistent on getting a trial that he testified he was competent and the jury believed him.

CONCLUSION

Based on the foregoing, Respondent submits that the Petitioner's requests be denied.

Respectfully submitted,



DANIEL J. PORTER
ASSISTANT DISTRICT ATTORNEY

POST OFFICE BOX 569
LAWRENCEVILLE, GEORGIA 30246-0569

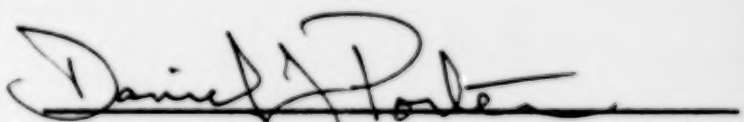
PHONE (404) 962-1435

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Petitioner with a copy of this Response to Petitioner's Brief by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage affixed thereon to:

Mr. Joseph M. Nursey
Counsel for Petitioner
Post Office Box 1978
Atlanta, Georgia 30301

This 14th day of July, 1987.



DANIEL J. PORTER
ASSISTANT DISTRICT ATTORNEY
GWINNETT JUDICIAL CIRCUIT

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES

JAMES WILLIE BROWN *v.* W. J. DODD, SHERIFF

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 86-6923. Decided October 5, 1987

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not hold this view, I would grant the petition for writ of certiorari in order to consider whether a defendant evaluated for competency by a state-appointed examiner has a due process right to an examiner whose qualifications and procedures meet minimal professional standards. The trial court failed to consider this question, and its conclusory order raises doubt as to whether the strictures of due process were met in this case.

I

Petitioner James Willie Brown has a 20-year history of severe mental illness. When he was arrested for murder in 1975, petitioner already had been institutionalized on three prior occasions. Over the next six years, petitioner was continually adjudged incompetent to stand trial. Petitioner spent most of that time institutionalized at Central State Hospital, where he was consistently diagnosed as a paranoid schizophrenic. In 1977, the hospital reported that petitioner was competent to stand trial, but petitioner's mental conditioned deteriorated after he was transferred to the local jail and on the joint motion of the state and his counsel, he was recommitted to Central State as incompetent. Petitioner re-

mained at Central State until 1980, when a hospital doctor again determined petitioner could stand trial. Although petitioner's doctors had noted his history of aggravated illness during periods of incarceration and had recommended that he be kept at the hospital until just before trial, petitioner was jailed until his competency trial in April, 1981. During this time, a physician at the jail examined petitioner and once again found him incompetent; petitioner's counsel was never informed of this evaluation.

Petitioner filed a demand for speedy trial early in 1981, and a competency trial was scheduled before a special jury. The morning of trial, the court appointed Lewis Collins to evaluate petitioner's competency. Collins had received his Ph.D from the Georgia State University only ten days before. He was not a licensed psychologist, and in fact later failed the state licensing examination twice. He had received no formal training in conducting competency evaluations. Collins's entire evaluation of petitioner's competency consisted of one 20-minute interview. Collins did not talk to any of the doctors who previously had examined petitioner, he performed no psychological testing, and the only record he examined was a short discharge summary from Central State. From this meager examination, Collins concluded that petitioner was competent to stand trial. The jury agreed, and three months later petitioner was tried and convicted of murder and sentenced to death.

At the instant state habeas proceeding, a number of experts testified that Collins's qualifications and examination for competency were substandard. The trial court nevertheless determined without explanation that Collins "was qualified by his education and experience to give an opinion as to the sanity of the Petitioner." App. to Pet. for Cert. B–2. The court therefore concluded that "[t]he jury properly found the Petitioner competent to stand trial based upon the evidence before it." *Ibid.* The Supreme Court of Georgia then

denied petitioner's application for a certificate of probable cause to appeal.

II

In *Ake* v. *Oklahoma*, 470 U. S. 68, 83 (1985), this Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." The guarantee recognized in *Ake*, it is important to stress, is not just that the State ensure access to a psychiatrist, but that it ensure that the psychiatrist be a *competent* professional who will perform an *appropriate* examination. Similarly, our cases interpreting the constitutional guarantee of counsel have recognized that that guarantee comprehends a degree of competence; thus, a State cannot discharge its duty to provide counsel by appointing an attorney who fails to render adequate legal assistance. *Strickland* v. *Washington*, 466 U. S. 668, 685–686 (1984). See *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985) ("[N]ominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.").

The instant case calls upon the Court to determine whether an expert appointed by the state to evaluate a defendant's competency to stand trial must meet similar minimum standards. Although we have never confronted the issue directly, I have no doubt that the due process clause incorporates such a safeguard. We already have recognized that "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope* v. *Missouri*, 420 U. S. 162, 172 (1975). An examination that meets minimum professional standards performed by a com-

petent psychologist or psychiatrist must count among these adequate procedures. Expert testimony is the most compelling evidence offered to a jury charged with the task of evaluating a defendant's competency to stand trial. As we have recognized in the context of an evaluation of sanity, "[w]hen jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial . . . ." *Ake* v. *Oklahoma*, *supra*, at 81. Indeed, a defendant subjected to a substandard examination by an unqualified professional may be placed in a worse position than a defendant who is denied an evaluation in the first place. If the "expert" concludes the defendant is competent to stand trial, that conclusion is cloaked in the special authority that we have recognized an expert witness conveys to the jury. See *ibid.*, at n. 7. I therefore believe that when a State appoints an examiner to evaluate a defendant's competency to stand trial, the Constitution requires that the examiner possess minimum professional qualifications and that his examination procedures conform to minimum professional standards.

The trial court apparently did not believe this case raised any constitutional concerns, and it did not consider whether Collins's examination was consistent with the requirements of the due process clause. In my view, there appears to be serious doubt as to whether petitioner's due process rights were met in this case. Collins's qualifications were, at best, undistinguished. Collins, who had received his psychology degree only ten days before he evaluated petitioner, had never taken Georgia's licensing examination, and he later failed that examination twice. The Chairman of the Board of Examiners of Psychology for the State of Georgia testified at the habeas trial that the licensing examination measures minimum skills and that a person who had flunked the test twice might not be qualified to act as a psychologist. Pet. for Cert. 7. Even if Collins were considered qualified to make an evaluation of competency, his examination of peti-

tioner in this case appears to have been hopelessly substandard. Every expert who testified at the habeas trial indicated that Collins's examination was deficient. Collins performed no psychological tests, consulted none of the doctors who previously had examined petitioner, and did not even bother to read most of petitioner's file. This approach is especially suspect in light of petitioner's long history of mental illness and six-year history of incompetency. I would grant the petitioner for certiorari to consider whether this treatment can be squared with the due process right not to be tried or convicted while incompetent to stand trial.